

(916) 445-8485

December 5, 1978

Dear

This is in response to your October 19, 1978, letter to this Board wherein you request that all proceeds from the timber yield tax slated for distribution to Mendocino County be withheld until such time as the County complies with the state law regarding TPZ zoning. We must advise that the statutory scheme neither contemplates such an action nor permits it.

As you are aware, AB 1258/Stats. 1976, Ch. 176 changed the existing system of taxing timber and land on which timber is growing. Beginning on April 1, 1977, a yield tax is imposed on timber harvested from privately or publicly owned land based on the volume of timber harvested, the immediate harvest value of the timber, as determined by this Board, and the yield tax rates. These changes were accomplished by additions to the Revenue and Taxation Code, Sections 38101-38908. Pursuant to Sections 38905 and 38906, the State Controller is to transmit yield tax revenues to the counties.

As for the taxing of land on which timber is growing, beginning with the 1977-78 fiscal year, privately owned land primarily devoted to and used for growing and harvesting timber is to be zoned for minimum 10-year periods as timberland preserve, and it is to be valued for property taxation, in general, on the basis of its use for growing and harvesting timber only. These changes were accomplished by additions to the Government Code, Sections 51100-51295, and by additions to the Revenue and Taxation Code, Sections 431-437.

A review of the above-mentioned sections will disclose that the timber yield tax law and its operation is separate and distinct from the sections pertaining to the zoning and taxing of land on which timber is growing. Specifically, with respect to your request, the State Controller's transmittal of yield tax revenues to the counties is not contingent upon the counties' zoning and taxing of such land. Rather, the acts called for in

Section 51113, to which you have referred, encompass to a large extent the enactment of a zoning ordinance and completion of other zoning-related matters. The enactment of a zoning ordinance is solely a legislative act and a governmental function, not a matter over which a board such as this one may exercise its authority. As stated by the court in Tandy v. City of Oakland, 208 Cal. App. 2d 609:

"The determination of whether or not to enact a zoning ordinance and the determination of its provisions and terms are entirely within the discretion of the municipal legislative body or other zoning legislative authority, subject to such requirements as may exist relative to study and recommendation by zoning commissions, notices, hearings and initiative and referendum. Such municipal discretion will not be interfered with by the courts except for clear abuse of the discretion or excess of power, and in case of doubt or if the question is fairly debatable, a court cannot substitute its judgment for that of the municipality. In other words, a municipal corporation has a right to determine whether conditions or the public interests demand an exercise of the power to pass a zoning ordinance and to select the measures that are necessary for that purpose. A fortiori, the wisdom or good policy of a zoning ordinance is for a municipality to determine and the courts have nothing to do with it."

The discretion usually afforded municipal legislative bodies in such matters may be somewhat curtailed in this instance since Section 51113 provides that boards of supervisors shall zone as timberland preserve all parcels submitted to it by petition pursuant thereto, which meet all of the criteria adopted pursuant to subdivision (c) thereof. As used in the Government Code, "shall" is mandatory (Gov. Code, § 14). Accordingly, we would suggest that you again communicate with the Mendocino County Board of Supervisors toward the end of having it proceed to implement Section 51113. Failing this, your only recourse would be to file an action in the appropriate court seeking to have the Board of Supervisors comply with the provisions of the section.

Very truly yours,

James K. McHanigal, Jr.
Tax Counsel

JKM:fr

cc: Mr. Paul Crebbin, Timber Tax Division
bc: Mr. Watler R. Senini, Mr. Verne Walton, Mr. Frank Wilson